IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No 8571 of 2004
WITH
CRIMINAL MISC. APPLICATION NO.8879 OF 2004

For Approval and Signature:

HON'BLE MR.JUSTICE R.P.DHOLAKIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

STATE OF GUJARAT

Versus

KANAKSINH MOHANSINH MANGROLA

Appearance:

1. Criminal Misc.Application No. 8571 of 2004
MR PR ABICHANDANI, APP for applicant
SR.COUNSEL, MR SI NANAVATI FOR M/S NANAVATI & NANAVATI for opponent

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CORAM : HON'BLE MR.JUSTICE R.P.DHOLAKIA

Date of decision: 05/11/2004

C.A.V. JUDGEMENT

This application under Sec.439(2) of the Code of Criminal Procedure has been filed by the State for cancellation of bail granted to the opponent vide order dated 1-9-2004 passed by the learned Sessions Judge, Surat, in Criminal Misc. Application No.1212 of 2004 in connection with the offences punishable under Secs.406, 408, 409, 418, 420, 467, 468, 471, 120-B and 34 of the Indian Penal Code on 29-1-2003 registered as C.R.No.I-52 of 2004 with DCB Police Station, Surat.

2. The short facts of the case are that an FIR came to lodged with DCB Police Station, Surat by Dharmendrasinh P.Thakor, the C.E.O. of the Suryapur Cooperative Bank Ltd. against the present opponent-accused and others alleging that large scale irregularities have been committed by the accused persons in connivance with each other misappropriating amount to the tune of Rs.1.32 crores. Said complaint was registered as C.R.No.I-52 of 2004 before DCB Police Station, Surat. Pursuant to registration of the offences, the opponent preferred Cri.Misc.Appln.No.1212 of 2004 before the court below. Learned Sessions Judge, Surat, vide common order dated 1-9-2004 released the opponent on bail which is giving rise to prefer the present application for cancellation of bail.

3. Previously, as per the present roster, this matter was placed before my Brother Judge, Mr.Justice D.N.Patel, Court No.22, wherein while issuing notice vide order dated 14-9-2004 which was made returnable on 20-9-2004, the impugned order dated 1st September, 2004 passed in Cri.Misc.Appln.No.1212 of 2004 by the court below was stayed and non-bailable warrant was issued against the present opponent. Meanwhile, opponent-accused preferred Cri. Misc. Appln.No.8879 of 2004 in Cri.Misc.Appln.No.8571 of 2004 for revoking the said order dated dated 14-9-2004 through learned advocate, Mr.B.B.Naik. However, no order was passed upon said application by my Brother Judge, Mr.Justice D.N.Patel. A mention was made by learned advocate that M/s Nanavati & Nanavati is appearing on behalf of the accused. Since my Brother Judge, Mr.Justice D.N.Patel, is not taking up the matter pertains to M/s Nanavati & Nanavati, this matter has been placed before this Court as per the order dated 15-9-2004 passed by Hon'ble Chief Justice. In pursuance of that, notice was issued in Cri.Misc.Appln.No.8879 of 2004 which was made returnable on 17-9-2004. Thereafter, it was adjourned upon the request being made by the learned counsel for the

opponent-accused that if the main matter i.e. Cri.Misc.Appln.No.8571 of 2004 is finally heard, then he would not argue Cri.Misc.Appln.No.8879 of 2004. Thereafter, rule was issued in Cri.Misc.Appln.No.8571 of 2004 by this Court vide order dated 29-9-2004 wherein Mr.Sanjeev Dave for M/s Nanavati & Nanavati waived service of notice of rule on behalf of the opponent-accused.

4. I have heard Mr.P.R.Abichandani, learned Addl. Public Prosecutor for the applicant and learned Senior Counsel, Mr.S.I.Nanavati for M/s Nanavati & Nanavati for the opponent in Cri.Misc.Appln.No.8571 of 2004.

5. Learned Addl. Public Prosecutor for the applicant-State, Mr.P.R.Abichandani, has taken me through the reasoned common order passed by the court below in Cri.Misc.Appln.No.1212 of 2004 more particularly para 7 pertaining to various judgments relied upon by the learned advocate appearing for the respective parties and thereafter observations made by the court below in paragraph No.9 that "In the humble view of this Court (1) court will have to consider the gravity of offence first. Higher the gravity, better the chances of flee away. It is settled legal position and common human psychology that one will try to avoid to face the trial if the punishment is likely to be maximum, and if the offence is serious one, irrespective of the amount of the bail and the bond coupled with the condition. (2) Court will have to consider socio-economic status of the accused too(3) Court will have to consider the possibility of the availability of the accused during the trial (4) Court will have to also consider the eminent danger if any, against the life and limb of the accused himself. Last but not the least (5) the Court will have to consider the impact of its own order on the public at large and the position of law and order. Court cannot prefer to sit on ivory tower and cannot be a spectator when the offence is connecting and affecting the vein and artery of the nation, that is to say, the liquid economic of the country". Taking me through paragraph No.13 of the impugned order, he has argued that the court has discussed regarding the offence registered as DCB Police Station, Surat C.R.No.I-8 of 2003 and held that "So far as investigation is concerned, C.R.No.8/03 is already investigated and charge sheet bearing NO.1887/03 is before the competent court". It is further held by the court below that "True it is, the copy of the charge sheet reveals some observation as to CC 49 and 50... But the fact remains that, the investigation pertaining to C.R.No.I 8/03 is already over". Further it is held that

"The large amount alleged to have been involved in the scam is in connection with C.R.No.8/03. As it is observed earlier, previously the figure was Rs.45 crores and latest as it is disclosed by learned Public Prosecutor, it is 32 crores. Out of that amount, certain crores of rupees are already recovered. We are least concerned so far as that transaction is concerned. We are concerned with C.R.No.52/04. At the cost of repetition, this court prefer to refer these two crimes separately". On the availability of the accused, it is held by the court below that practically all the accused are belonging to Surat or Surat District. So far as tampering and hampering with the prosecution witnesses are concerned, it was held that practically all the evidence is collected by investigating agency and the case of the prosecution is based on documents. It is further held in para 14 that "if Milind R. Patel is not in existence, then defence cannot create it, and if Milind R. Patel is the same person who is known as Milind N. Patel, then that can be considered during the trial. Who deposited the amount at the instance of whom is also a question of appreciation of evidence to be considered during the trial. Last but not the least, the impact of this order on the society and public at large. True it is, the court cannot shut its eyes so far as interest of the nearer and dearer of the victim i.e. to say the depositors and the account holder are concerned, their interest is well protected. Practically, the total amount is with the bank." As far as political rivalry is concerned, it is held that "This Court is not inclined to decide the political rivalry of either party. But this court is positively inclined to observe that, court will have to struck the balance between the individual liberty of a citizen and interest of public at large." Finally it is concluded by saying that "the alleged scam is by creating CC No.49 and 50. The advancement of the loan is to the tune of Rs.84 lacs and some odd figure, and Rs.1 crore 32 lacs and some odd figure is already paid by someone or on behalf of the accused by someone with the bank. The applicants are having their own social status. The existence of two FIRs are different. The investigation of C.R.No.1-8/03 is already over. The case of the prosecution is based more or less on document. And last but not the least, it is known to all that each court of Surat District are heavily burdened with the pending cases. This case will take its own time to have final adjudication." By observing as aforesaid, learned Sessions Judge has released the applicants therein on bail by common order.

6. Learned Addl. Public Prosecutor, placing

reliance upon the case of Kalyan Chandra Sarkar Vs. Rajesh Ranjan @ Pappu Yadav and another, reported in 2004(3) Crimes 63 (SC), has argued that the order is based on the ground that each Court of Surat District is heavily burdened with pending cases which would take its own time for final adjudication. According to him, said finding of the court below is incorrect in view of the fact that series of Fast Track Courts have been established in various districts of the State including Surat District. It is further argued that though gravity and seriousness of facts have been narrated by the court below, same have not been considered by the court below while passing the order and ignored the fact that amounts have been siphoned off in the name of fictitious persons namely Milind R. Patel as narrated in para 14 of the order. While narrating the same, it has held by the court below that the defence cannot create it if no Milind R Patel is not there and if Milind R. Patel is the same person person who is known as Milind N. Patel, then that can be considered during the trial. According to him, the approach of the court below appears to be casual in observing that "who deposit the amount at the instance of whom is also a question of appreciation of evidence to be considered during trial". Mr.Abichandani has argued that yet court has not considered the above aspects of the matter and has not permitted the investigating agency to investigate though amounts have been siphoned off by the opponent and directors in the names of fictitious persons and deposited by fictitious persons. According to him, since it is only the tips of the iceberg, investigation ought to have been permitted by the court below for reaching the roots of the offence. If the investigating agency at the end of investigation does not find any materials against the opponent, they may not even file a charge-sheet. He has further argued that court below has also not considered the impact of his order the society would be having. All the relevant arguments have been advanced by his counterpart into the court below regarding DCB Surat Police Station C.R.No.I-8 of 2003 disclosing name of the present opponent as one of the accused requiring presence of the accused for interrogation as till this date, he is not available for interrogation even after initiation of proceedings under Secs.70 and 82 of Cr.P.C. and, therefore, prosecution could not investigate the matter qua the present opponent though he was shown in the above referred charge-sheet as accused in column No.2 and, hence, question of not having any iota of evidence against the opponent accused in the above referred charge-sheet may not arise at all. Court below has ignored the fact by only saying that it is a different complaint and granted bail to the opponent

creating serious impact upon the society. It has also been argued by him that though it is observed by the court in para 14 that the accused is belonging to either Surat or Surat District. Still, however, opponent is not available for the offence till this date and in these circumstances, court ought to have come to the conclusion that if accused will be released, he may not be available for investigation and for trial also. It has also been observed by the court below that investigation is over but, according to him, investigation has just begun. It was also held by the court below that case of the prosecution is based on documentary evidence. When it is knowing that the most of the important documents have been taken away from the bank and are not available with the investigation and for that purpose also, investigation was a necessity. As far as the amount is concerned, it has been argued by him that during the course of investigation, it was revealed that part of the amount has repaid and for certain amount, simple hawala entry was placed which, according to him, is concocted as all the hawala entries have been done after the bank has withdrawn from clearing house and, therefore, in real sense, it cannot be said that amount has been repaid. It is further argued that the opponent is having direct control over the bank even now as there are various accounts of his trust. Court below has also ignored various statements of Naginbhai Patel, Devidas Thakordas Badami, Dilipbhai Bachubhai Shah and others. In view of the above, it is requested that the impugned order may be quashed and set aside and bail granted to the opponent may be cancelled.

7. Learned Senior Counsel, Mr.S.I.Nanavati for M/s Nanavati & Nanavati for the opponent-accused has mainly argued the same which have been contended in the affidavit-in-reply by the opponent. Hence, I am narrating them hereinafter. It is the first contention of the learned counsel for the opponent that learned Sessions Judge, Surat, has examined in detail all the aspects of the case before granting bail to the opponent namely, the availability for trial and likelihood of tampering with the evidence and has given cogent and detailed reasons in arriving at a conclusion and hence, said order does not require any interference. It has also been contended that evidence consists mainly of documents and are in custody of the investigating agency. Moreover the bank is under the control of the Administrator appointed by the State bank and, hence, the opponent accused has no access to the bank. Therefore, question of tampering with the record of the bank is out of question. He was also a member of Rajya Sabha from

1994 for a period of six years. He worked as a Chairman of the Gujarat State Fertilizer Corporation for the period 1996-97 and was also the Chairman of the Sardar Sarovar Narmada Nigam Ltd. in the year 1998. He was performing his duty very efficiently, honestly and diligently while holding public posts. It is also submitted that he is a leading citizen of Surat and residing there with his family and has roots in the society and hence, it was held by the Court below that he will be available for trial. According to him, the first information report does not contain allegation regarding the offences punishable under Secs.467, 468 and 471 of IP Code. However, same were added by the I.O. subsequently with an intention to show the seriousness of the offence that it is punishable with life. Court below has rightly taken into consideration that looking to the workload of the court in the State of Gujarat, trial is not likely to be conducted and concluded in near future which, according to him, is also one of the reasons for exercise of discretion by the learned Sessions Judge. It has also been observed by the court below that it has considered the case in all its seriousness and has not viewed the case lightly. It has also been contended that in the FIR filed by Babubhai Gamit against 60 persons with DCB being C.R.No.I-8 of 2003, role of the present applicant has not been referred at all and the investigation is over and charge-sheet has been filed and even in that first information report or in the charge-sheet papers more particularly in the first page, no role or involvement of the opponent is shown. In this regard, he has taken me through paragraph 5 of the first page of the summary of the charge-sheet. Thereafter, after a long period, to involve the accused with the crime in question, present complaint has been filed by the Administrator of the bank for the same offence and, therefore, it is a second complaint for the same offence and, therefore, it is not maintainable only on that ground. He has placed reliance upon the case reported in AIR 2001 S.C. 2637. It is further contended that even if the allegation that the money has been siphoned off by the opponent is believed to be true, then also, all moneys have been repaid and, therefore, opponent is entitled to be released on bail in view of various judgments of this Court wherein defaulters have been granted bail on repayment of dues or sometimes with some terms and conditions for repayment. Therefore also, opponent was required to be granted bail.

8. Mr.Nanavati has placed reliance on the case of Dolatram and Others Vs. State of Haryana, (1995) 1 S.C.C. 349. It has been held by the Apex Court in para 4 of the judgment as under:

"4. Rejection of bail in a non-bailable case at the initial stage and the cancellation of bail already granted, have to be considered and dealt with on different basis. Very cogent and overwhelming circumstances are necessary for an order directing the cancellation of the bail, already granted. Generally speaking, the grounds for cancellation of bail, broadly (illustrative and not exhaustive) are: interference or attempt to interfere with the due course of administration of justice or evasion or attempt to evade the due course of justice or abuse of the concession granted to the accused in any manner. The satisfaction of the court, on the basis of material placed on the record of the possibility of the accused absconding, is yet another reason justifying the cancellation of bail. However, bail once granted should not be cancelled in a mechanical manner without considering whether any supervening circumstances have rendered it no longer conducive to a fair trial to allow the accused to retain his freedom by enjoying the concession of bail during the trial."

9. He has also relied on the case of Subhendu Mishra Vs. Subrat Kumar Mishra and another, AIR 1999 S.C. 3026 more particularly towards head note which reads as under:

"Criminal P.C. (2 of 1974), S.439--Cancellation of bail--High Court overlooked distinction of factors relevant for rejecting bail at initial stage and cancelling bail once granted--Cancellation of bail done in mechanical manner--Order not sustainable."

10. Reliance was also placed by him on Ghanchi Rubina Salimbhai Vs. Metubha Diwansingh Solanki, (2003) 7 S.C.C. 183 towards head note which reads thus:

"Criminal Procedure Code, 1973--S.439-Bail--Grant of--After denial by trial court, High Court granting bail must record reasons--Held, where the trial court found material to establish a prima facie case against the respondent-accused and denied bail, High Court ought to at least briefly indicate reasons for reversing the trial court's findings and granting bail--Order of grant of bail by High Court set aside."

He has drawn my attention towards para 5 of the aforesaid reported judgment which is as follows:

> "5. Since the trial court has assigned reasons for refusing bail which includes availability of material to establish prima facie case against the respondent-accused, and looking to the gravity of the offence as also the apprehension of the complainant as to the possibility of interference by the accused with the investigation and threat to the prosecution witnesses in the event of they being enlarged on bail, it would have been more appropriate if the High Court could have at least briefly indicated the reasons which it thought entitled the respondent-accused to bail. It may be that any strong expression of opinion in the nature of a finding in a bail application by the High Court though not binding on the trial court, could influence the mind of the trial court since such observation comes from the High Court, yet it is appropriate that some indication of the grounds on which the High Court rejected the findings recorded by the trial court, should have been reflected in the order by which the High Court reversed such findings."

11. Learned counsel for the opponent-accused has also relied on the case of State of Gujarat Vs. Ashokbhai Nanjibhai Vaghani, 2004(2) G.L.H. 64 towards head note which reads as under:

> "Code of Criminal Procedure, 1973--S.439--Cancellation of bail--Sessions Court did not give proper reasoning to release accused on bail in serious offence of S.302, etc.--Only aspects of charge-sheet having been filed and accused being local residents were considered--Since the prim facie case was not considered on merits, order of bail quashed--However, according to 2003(7)S.C.C. 183 and since accused are already on bail for 7 months, they are allowed to continue on bail till Sessions Court decides the application afresh within 15 days--Accused directed to mark presence before police every alternate day in the meantime."

12. In the aforereferred reported case, this High Court, while deciding the matter of cancellation of bail, has remanded the matter to the trial court for a decision

afresh on the ground of the trial court having given improper reasons in releasing the accused on bail in a serious offence. The principle enunciated in the said judgment is that while dealing with the cancellation of bail, court should not do the same mechanically and while grant or rejection of bail, proper reasons are required to be assigned.

13. It is required to be noted that after remanding the matter by the High Court in the aforesaid reported judgment, the trial court has again granted bail. However, same was cancelled by the High Court vide order dated 18-3-2004 passed in Cri.Misc.Appln.No.726 of 2004 which is reported in 2004(6) G.H.J. 112.

14. There cannot be any dispute regarding the principles laid down in the aforesaid reported cases. Sum an substance of those cases are that the High Court can interfere with the order passed below under Sec.439 mainly on the ground of judicial discretion in granting bail is exercised either erroneously or of any irrelevant consideration. In view of the above, if the court wants to cancel the bail, court should consider the material on file and show how judicial discretion exercised by the learned Sessions Judge was erroneous. Keeping in mind the law laid down by the Apex Court and the High Court in the aforesaid reported cases and also keeping in mind the documentary evidence, statements of witnesses and impugned order, I am proceeding with the matter.

15. In short, it is revealed from the arguments advanced by the learned counsel for the respective parties and from the reasoned order passed by the court below and also from the documentary evidence on record that while passing the order, court below had not considered various aspects arising out of arguments advanced by the State. It has ignored the material aspects namely, charge-sheet papers of offence registered as DCB Police Station C.R.No.I-8 of 2003 by simply observing that both the complaints are different. It is true that both the complaints are different. However, for the purpose of availability of the accused, court below ought to have considered the facts that name of the present opponent was disclosed during the course of investigation and hence, for interrogation and for reaching the roots of the offence, his presence was required and as he was not available, proceedings under Secs.70 and 82 of the Code of Criminal Procedure were initiated. Despite which, he is not available for the investigation till date. This is one of the strongest grounds to have been considered by the court below. Even

though the court below has narrated the judgments relied upon by the respective parties in para 7 and has described the facts to be taken into consideration at the time of deciding the bail in paragraph No.9, same were not considered in arriving at a conclusion and smoothly came out by stating that "Let it be as it is". The court below ought to have considered that huge amounts of money deposited by pensioners, widows, small and middle class people were siphoned off by fictitious persons and when a dangerous alarm was raised, amounts were repaid by way of hawala entry that too after withdrawal of the bank from clearing house. It also does not appear to have considered the statements of witnesses viz., Naginbhai Patel, Devidas Thakordas Badami, Dilipbhai Bachubhai Shah and others. It has also not considered that the law on this point is very settled and time and again it has been reiterated by the Apex Court and lastly in Pappu Yadav (supra). No reasons have been assigned for ignoring all the aforesaid factors by the court below. This was not the correct approach to have been adopted by the court below while deciding the matter under Sec.439 of Cr.P.C. This Court has taken note of the fact that the non-bailable warrant issued upon the opponent vide order dated 14-9-2004 by this Court (Coram: D.N.Patel,J.) could not be served till date.

16. I am aware that while deciding the matter under Sec.439, court should not evaluate the evidence on record. However, at the same time, court should not ignore the prima-facie materials appearing on record. The learned Sessions Judge, Surat, has failed to discharge his duty in not considering the factors in proper perspective though categorically come out after going through the judgments relied upon by the learned counsel for the respective parties in paragraph No.9. In these circumstances, instead of cancelling the bail granted to the opponent-accused by the court below, opportunity is required to be given to decide the same afresh on the basis of prima-facie evidence and contentions raised by the respective parties keeping in mind the law laid down by this Court as well as the Apex Court on merits. This Court in the case of State of Gujarat Vs. Ashokbhai Nanjibhai Vaghani, 2004(2) G.L.H. 64 has remanded the matter since prima-facie case was not considered on merits. Hence, keeping in mind the aforesaid, I am remanding the matter.

17. Thus, the matter is remanded to the court below for a decision afresh on merits. The order dated 1-9-2004 passed in Cri.Bail Application No.1212 of 2004 by the learned Sessions Judge, Surat, is quashed. As the

opponent-accused is already on bail, he is ordered to be continued on same bail till Sessions Court decides the application afresh. However, the opponent-accused is directed not to enter into the limits of Surat District but for the purpose of marking his presence and for attending the Court in connection with the case, he is free to enter but shall leave the limits soon thereafter. He shall provide his present and permanent addresses to the I.O. as well as the Court. This application stands disposed of. Rule accordingly. In view of the aforesaid order, order dated 14-9-2004 passed by this Court in this matter will not remain in operation.

18. In view of the aforesaid order, Misc. Cri. Appln.No.8879 of 2004 does not survive and is disposed of accordingly. Notice is discharged.

19. The observations by this Court in this order being made for the purpose of deciding this matter will not come in way of the parties.

(R.P.DHOLAKIA,J.)

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